

Sector Southeastern New England Captain of the Port Zone.

■ 3. Add § 165.123 to read as follows:

**§ 165.123 Cruise Ships, Sector Southeastern New England Captain of the Port (COTP) Zone.**

(a) *Location.* The following areas are security zones: All navigable waters within the Southeastern New England Captain of the Port (COTP) Zone, extending from the surface to the sea floor:

(1) Within a 200-yard radius of any cruise ship that is underway and is under escort of U.S. Coast Guard law enforcement personnel or designated representative, or

(2) Within a 100-yard radius of any cruise ship that is anchored, at any berth or moored.

(b) *Definitions.* For the purposes of this section—

*Cruise ship* means a passenger vessel as defined in 46 U.S.C. 2101(22), that is authorized to carry more than 400 passengers and is 200 or more feet in length. A *cruise ship* under this section will also include ferries as defined in 46 CFR 2.10–25 that are authorized to carry more than 400 passengers and are 200 feet or more in length.

*Designated representative* means any Coast Guard commissioned, warrant, or petty officer who has been designated by the COTP to act on the COTP's behalf. The designated representative may be on a Coast Guard vessel, or onboard Federal, state, or a local agency vessel that is authorized to act in support of the Coast Guard.

*Southeastern New England COTP Zone* is as defined in 33 CFR 3.05–20.

(c) *Enforcement.* The security zones described in this section will be activated and enforced upon entry of any cruise ship into the navigable waters of the United States (see 33 CFR 2.36(a) to include the 12 NM territorial sea) in the Southeastern New England COTP zone. This zone will remain activated at all times while a cruise ship is within the navigable waters of the United States in the Sector Southeastern New England COTP Zone. In addition, the Coast Guard may broadcast the area designated as a security zone for the duration of the enforcement period via Broadcast Notice to Mariners.

(d) *Regulations.* (1) In accordance with the general regulations in 33 CFR part 165, subpart D, no person or vessel may enter or move within the security zones created by this section unless granted permission to do so by the COTP Southeastern New England or the designated representative.

(2) All persons and vessels granted permission to enter a security zone must

comply with the instructions of the COTP or the designated representative. Emergency response vessels are authorized to move within the zone, but must abide by the restrictions imposed by the COTP or the designated representative.

(3) No person may swim upon or below the surface of the water within the boundaries of these security zones unless previously authorized by the COTP or his designated representative.

(4) Upon being hailed by a U.S. Coast Guard vessel or the designated representative, by siren, radio, flashing light or other means, the operator of the vessel shall proceed as directed.

(5) Vessel operators desiring to enter or operate within the security zone shall contact the COTP or the designated representative via VHF channel 16 or 508–457–3211 (Sector Southeastern New England command center) to obtain permission to do so.

Dated: June 16, 2011.

**V.B. Gifford, Jr.,**

*Captain, U.S. Coast Guard, Captain of the Port Southeastern New England.*

[FR Doc. 2011–17536 Filed 7–12–11; 8:45 am]

**BILLING CODE 9110–04–P**

## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Part 251

[Docket No. 2011–5]

#### Copyright Arbitration Royalty Panel Rules and Procedures

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Final rule; technical amendment.

**SUMMARY:** The Copyright Office is making an amendment to its regulations by removing Part 251 Copyright Arbitration Royalty Panel Rules of Procedure. In 2004, Congress replaced the Copyright Arbitration Royalty Panels with three Copyright Royalty Judges who operate under separate regulations.

**DATES:** *Effective Date:* July 13, 2011.

**FOR FURTHER INFORMATION CONTACT:**

Tanya M. Sandros, Deputy General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

**SUPPLEMENTARY INFORMATION:** On November 30, 2004 the Copyright Royalty and Distribution Reform Act of 2004 was signed into law creating the

Copyright Royalty Judges, Public Law 108–419, 118 Stat. 2341. The Act replaced the royalty panels with three Copyright Royalty Judges who promulgated separate regulations to govern their proceedings. See 37 CFR Ch. III. The Act also provided for the retention of the Copyright Arbitration Royalty Panels (“CARP”) for the purpose of concluding certain open proceedings. For this reason, the Office retained its regulations in order to complete the open proceedings and as a historical reference for those determinations that had been decided under the CARP system and had been appealed. These proceedings, however, have all been concluded and there is no longer a need for these regulations. Hence, the Office is amending its regulations to remove the section that governed the CARP proceedings.

#### List of Subjects in 37 CFR Part 251

Copyright Arbitration Royalty Panels (CARPs), Copyright General Provisions, Copyright Royalty Board, Copyright Royalty Judges.

#### Final Rule

#### PART 251—[REMOVED]

Accordingly, under the authority at 17 U.S.C. 702, 37 CFR Chapter II, Subchapter B is amended by removing part 251.

Dated: June 28, 2011.

**Maria A. Pallante,**

*Register of Copyrights.*

Approved by:

**James H. Billington,**

*The Librarian of Congress.*

[FR Doc. 2011–17657 Filed 7–12–11; 8:45 am]

**BILLING CODE 1410–30–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R05–OAR–2007–1179; FRL–9436–7]

#### Approval and Promulgation of Air Quality Implementation Plans; Illinois; Indiana; Michigan; Minnesota; Ohio; Wisconsin; Infrastructure SIP Requirements for the 1997 8-Hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to approve elements of submissions by Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin regarding the

infrastructure requirements of sections 110(a)(1) and (2) of the Clean Air Act (CAA) for the 1997 eight-hour ground level ozone national ambient air quality standards (1997 8-hour ozone NAAQS) and 1997 fine particle national ambient air quality standards (1997 PM<sub>2.5</sub> NAAQS). The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA. The proposed rulemaking was published on April 28, 2011. During the comment period, which ended on May 31, 2011, EPA received three comment letters raising a number of concerns, which will be addressed in this final action.

**DATES:** This final rule is effective on August 12, 2011.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2007-1179. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Andy Chang at (312) 886-0258 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Andy Chang, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-0258, [chang.andy@epa.gov](mailto:chang.andy@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This **SUPPLEMENTARY INFORMATION** section is arranged as follows:

- I. What is the background for this action?
- II. What is the scope of this final rulemaking?
- III. What is our response to comments received on the notice of proposed rulemaking?
- IV. What action is EPA taking?
- V. Statutory and Executive Order Reviews

## I. What is the background for this action?

This final rulemaking addresses state submittals from each state (and appropriate state agency) in EPA Region 5: Illinois Environmental Protection Agency (Illinois EPA); Indiana Department of Environmental Management (IDEM); Michigan Department of Environmental Quality (MDEQ); Minnesota Pollution Control Agency (MPCA); Ohio Environmental Protection Agency (Ohio EPA); and Wisconsin Department of Natural Resources Bureau of Air Management (WDNR). At the time of our proposed rulemaking, each state had made submittals on the following dates: Illinois—December 12, 2007; Indiana—December 7, 2007, and supplemented on September 19, 2008, March 23, 2011, and April 7, 2011; Michigan—December 6, 2007, and supplemented on September 19, 2008 and April 6, 2011; Minnesota—November 29, 2007; Ohio—December 5, 2007, and supplemented on April 7, 2011; and, Wisconsin—December 12, 2007, and supplemented on January 24, 2011 and March 28, 2011. The submittals from each state, and the supplements thereto, may be found in the docket for this action.

Under sections 110(a)(1) and (2) of the CAA, and implementing EPA policy, the states were required to submit either revisions to their State Implementation Plans (SIPs) necessary to provide for implementation, maintenance, and enforcement of the 1997 8-hour ozone NAAQS or the 1997 PM<sub>2.5</sub> NAAQS, or certifications that their existing SIPs for ozone and particulate matter already met those basic requirements. The statute requires that states make these submittals within three years after the promulgation of new or revised NAAQS. However, intervening litigation over the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS created uncertainty about how states were to proceed.<sup>1</sup> Accordingly, both EPA and the states were delayed in addressing these basic SIP requirements.

In a consent decree with Earth Justice, EPA agreed to make completeness findings with respect to these SIP submittals. Pursuant to this consent decree, EPA published completeness findings for all states for the 1997 8-hour ozone NAAQS on March 27, 2008, and for all states for the 1997 PM<sub>2.5</sub> NAAQS on October 22, 2008.

On October 2, 2007, EPA issued a guidance document entitled "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997

8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards," making recommendations to states concerning these SIP submittals (the 2007 Guidance). Within the 2007 Guidance, EPA gave general guidance relevant to matters such as the timing and content of the submittals.

EPA published its proposed action on the states' submittals on April 28, 2011. During the comment period on this proposal, EPA received three comment letters raising a number of concerns with respect to various issues for one or more states addressed in the proposal. EPA addresses the significant comments in this final action.

EPA received comments concerning the proposed approval of the submission from the State of Wisconsin that require further evaluation. Accordingly, today EPA is not finalizing its proposed approval of that submission for section 110(a)(2)(C) with respect to two narrow issues: (i) The requirement for consideration of oxides of nitrogen (NO<sub>x</sub>); and (ii) the definition of "major modification" related to fuel changes for certain sources. EPA will address these issues in a later action.

## II. What is the scope of this final rulemaking?

EPA is currently acting upon SIPs that address the infrastructure requirements of CAA section 110(a)(1) and (2) for ozone and PM<sub>2.5</sub> NAAQS for various states across the country. Commenters on EPA's recent proposals for some States raised concerns about EPA statements that it was not addressing certain substantive issues in the context of acting on the infrastructure SIP submittals.<sup>2</sup> The commenters specifically raised concerns involving provisions in existing SIPs and with EPA's statements that it would address two issues separately and not as part of actions on the infrastructure SIP submittals: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources, that may be contrary to the CAA and EPA's policies addressing such excess emissions ("SSM"); and (ii) existing provisions related to "director's variance" or "director's discretion" that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA ("director's discretion"). EPA notes that there are two other

<sup>1</sup> See, e.g., *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001).

<sup>2</sup> See, Comments of Midwest Environmental Defense Center, dated May 31, 2011. Docket # EPA-R05-OAR-2007-1179 (adverse comments on proposals for three states in Region 5).

substantive issues for which EPA likewise stated that it would address the issues separately: (i) Existing provisions for minor source new source review programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs ("minor source NSR"); and (ii) existing provisions for prevention of significant deterioration (PSD) programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule," 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) ("NSR Reform"). In light of the comments, EPA now believes that its statements in various proposed actions on infrastructure SIPs with respect to these four individual issues should be explained in greater depth with respect to these issues.

EPA intended the statements in the proposals concerning these four issues merely to be informational, and to provide general notice of the potential existence of provisions within the existing SIPs of some states that might require future corrective action. EPA did not want states, regulated entities, or members of the public to be under the misconception that the Agency's approval of the infrastructure SIP submission of a given state should be interpreted as a reapproval of certain types of provisions that might exist buried in the larger existing SIP for such state. Thus, for example, EPA explicitly noted that the Agency believes that some states may have existing SIP approved SSM provisions that are contrary to the CAA and EPA policy, but that "in this rulemaking, EPA is not proposing to approve or disapprove any existing State provisions with regard to excess emissions during SSM of operations at facilities." EPA further explained, for informational purposes, that "EPA plans to address such State regulations in the future." EPA made similar statements, for similar reasons, with respect to the director's discretion, minor source NSR, and NSR Reform issues. EPA's objective was to make clear that approval of an infrastructure SIP for these ozone and PM<sub>2.5</sub> NAAQS should not be construed as explicit or implicit reapproval of any existing provisions that relate to these four substantive issues.

Unfortunately, the commenters and others evidently interpreted these statements to mean that EPA considered action upon the SSM provisions and the other three substantive issues to be integral parts of acting on an infrastructure SIP submission, and therefore that EPA was merely postponing taking final action on the

issue in the context of the infrastructure SIPs. This was not EPA's intention. To the contrary, EPA only meant to convey its awareness of the potential for certain types of deficiencies in existing SIPs, and to prevent any misunderstanding that it was reapproving any such existing provisions. EPA's intention was to convey its position that the statute does not require that infrastructure SIPs address these specific substantive issues in existing SIPs and that these issues may be dealt with separately, outside the context of acting on the infrastructure SIP submission of a state. To be clear, EPA did not mean to imply that it was not taking a full final agency action on the infrastructure SIP submission with respect to any substantive issue that EPA considers to be a required part of acting on such submissions under section 110(k) or under section 110(c). Given the confusion evidently resulting from EPA's statements, however, we want to explain more fully the Agency's reasons for concluding that these four potential substantive issues in existing SIPs may be addressed separately.

The requirement for the SIP submissions at issue arises out of CAA section 110(a)(1). That provision requires that states must make a SIP submission "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)" and that these SIPs are to provide for the "implementation, maintenance, and enforcement" of such NAAQS. Section 110(a)(2) includes a list of specific elements that "[e]ach such plan" submission must meet. EPA has historically referred to these particular submissions that states must make after the promulgation of a new or revised NAAQS as "infrastructure SIPs." This specific term does not appear in the statute, but EPA uses the term to distinguish this particular type of SIP submission designed to address basic structural requirements of a SIP from other types of SIP submissions designed to address other different requirements, such as "nonattainment SIP" submissions required to address the nonattainment planning requirements of part D, "regional haze SIP" submissions required to address the visibility protection requirements of CAA section 169A, new source review permitting program submissions required to address the requirements of part D, and a host of other specific types of SIP submissions that address other specific matters.

Although section 110(a)(1) addresses the timing and general requirements for

these infrastructure SIPs, and section 110(a)(2) provides more details concerning the required contents of these infrastructure SIPs, EPA believes that many of the specific statutory provisions are facially ambiguous. In particular, the list of required elements provided in section 110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive provisions, and some of which pertain to requirements for both authority and substantive provisions.<sup>3</sup> Some of the elements of section 110(a)(2) are relatively straightforward, but others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS.<sup>4</sup>

Notwithstanding that section 110(a)(2) states that "each" SIP submission must meet the list of requirements therein, EPA has long noted that this literal reading of the statute is internally inconsistent, insofar as section 110(a)(2)(I) pertains to nonattainment SIP requirements that could not be met on the schedule provided for these SIP submissions in section 110(a)(1).<sup>5</sup> This illustrates that EPA must determine which provisions of section 110(a)(2) may be applicable for a given infrastructure SIP submission. Similarly, EPA has previously decided that it could take action on different parts of the larger, general "infrastructure SIP" for a given NAAQS without concurrent action on all subsections, such as section 110(a)(2)(D)(i), because the Agency bifurcated the action on these latter "interstate transport" provisions within

<sup>3</sup> For example, section 110(a)(2)(E) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a substantive program to address certain sources as required by part C of the CAA; section 110(a)(2)(G) provides that states must have both legal authority to address emergencies and substantive contingency plans in the event of such an emergency.

<sup>4</sup> For example, section 110(a)(2)(D)(i) requires EPA to be sure that each state's SIP contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution. See, e.g., "Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call; Final Rule," 70 FR 25162 (May 12, 2005) (defining, among other things, the phrase "contribute significantly to nonattainment").

<sup>5</sup> See, e.g., *Id.*, 70 FR 25162, at 63-65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

section 110(a)(2) and worked with states to address each of the four prongs of section 110(a)(2)(D)(i) with substantive administrative actions proceeding on different tracks with different schedules.<sup>6</sup> This illustrates that EPA may conclude that subdividing the applicable requirements of section 110(a)(2) into separate SIP actions may sometimes be appropriate for a given NAAQS where a specific substantive action is necessitated, beyond a mere submission addressing basic structural aspects of the state's SIP. Finally, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS and the attendant infrastructure SIP submission for that NAAQS. For example, the monitoring requirements that might be necessary for purposes of section 110(a)(2)(B) for one NAAQS could be very different than what might be necessary for a different pollutant. Thus, the content of an infrastructure SIP submission to meet this element from a state might be very different for an entirely new NAAQS, versus a minor revision to an existing NAAQS.<sup>7</sup>

Similarly, EPA notes that other types of SIP submissions required under the statute also must meet the requirements of section 110(a)(2), and this also demonstrates the need to identify the applicable elements for other SIP submissions. For example, nonattainment SIPs required by part D likewise have to meet the relevant subsections of section 110(a)(2) such as section 110(a)(2)(A) or (E). By contrast, it is clear that nonattainment SIPs would not need to meet the portion of section 110(a)(2)(C) that pertains to part C, i.e., the PSD requirements applicable in attainment areas. Nonattainment SIPs required by part D also would not need to address the requirements of section 110(a)(2)(G) with respect to emergency episodes, as such requirements would not be limited to nonattainment areas. As this example illustrates, each type of SIP submission may implicate some subsections of section 110(a)(2) and not others.

<sup>6</sup> EPA issued separate guidance to states with respect to SIP submissions to meet section 110(a)(2)(D)(i) for the 1997 ozone and 1997 PM<sub>2.5</sub> NAAQS. See, "Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards," from William T. Harnett, Director Air Quality Policy Division OAQPS, to Regional Air Division Director, Regions I-X, dated August 15, 2006.

<sup>7</sup> For example, implementation of the 1997 PM<sub>2.5</sub> NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

Given the potential for ambiguity of the statutory language of section 110(a)(1) and (2), EPA believes that it is appropriate for EPA to interpret that language in the context of acting on the infrastructure SIPs for a given NAAQS. Because of the inherent ambiguity of the list of requirements in section 110(a)(2), EPA has adopted an approach in which it reviews infrastructure SIPs against this list of elements "as applicable." In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the purpose of the submission or the NAAQS in question, would meet each of the requirements, or meet each of them in the same way. EPA elected to use guidance to make recommendations for infrastructure SIPs for these NAAQS.

On October 2, 2007, EPA issued guidance making recommendations for the infrastructure SIP submissions for both the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS.<sup>8</sup> Within this guidance document, EPA described the duty of states to make these submissions to meet what the Agency characterized as the "infrastructure" elements for SIPs, which it further described as the "basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards."<sup>9</sup> As further identification of these basic structural SIP requirements, "attachment A" to the guidance document included a short description of the various elements of section 110(a)(2) and additional information about the types of issues that EPA considered germane in the context of such infrastructure SIPs. EPA emphasized that the description of the basic requirements listed on attachment A was not intended "to constitute an interpretation of" the requirements, and was merely a "brief description of the required elements."<sup>10</sup> EPA also stated its belief that with one exception, these requirements were "relatively self explanatory, and past experience with SIPs for other NAAQS should enable States to meet these requirements with

<sup>8</sup> See, "Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards," from William T. Harnett, Director Air Quality Policy Division, to Air Division Directors, Regions I-X, dated October 2, 2007 (the "2007 Guidance"). EPA issued comparable guidance for the 2006 PM<sub>2.5</sub> NAAQS entitled "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle (PM<sub>2.5</sub>) National Ambient Air Quality Standards (NAAQS)," from William T. Harnett, Director Air Quality Policy Division, to Regional Air Division Directors, Regions I-X, dated September 25, 2009 (the "2009 Guidance").

<sup>9</sup> Id., at page 2.

<sup>10</sup> Id., at attachment A, page 1.

assistance from EPA Regions."<sup>11</sup> For the one exception to that general assumption, however, i.e., how states should proceed with respect to the requirements of section 110(a)(2)(G) for the 1997 PM<sub>2.5</sub> NAAQS, EPA gave much more specific recommendations. But for other infrastructure SIP submittals, and for certain elements of the submittals for the 1997 PM<sub>2.5</sub> NAAQS, EPA assumed that each state would work with its corresponding EPA regional office to refine the scope of a state's submittal based on an assessment of how the requirements of section 110(a)(2) should reasonably apply to the basic structure of the State's SIP for the NAAQS in question.

Significantly, the 2007 Guidance did not explicitly refer to the SSM, director's discretion, minor source NSR, or NSR Reform issues as among specific substantive issues EPA expected states to address in the context of the infrastructure SIPs, nor did EPA give any more specific recommendations with respect to how states might address such issues even if they elected to do so. The SSM and director's discretion issues implicate section 110(a)(2)(A), and the minor source NSR and NSR Reform issues implicate section 110(a)(2)(C). In the 2007 Guidance, however, EPA did not indicate to states that it intended to interpret these provisions as requiring a substantive submission to address these specific issues in the context of the infrastructure SIPs for these NAAQS. Instead, EPA's 2007 Guidance merely indicated its belief that the states should make submissions in which they established that they have the basic SIP structure necessary to implement, maintain, and enforce the NAAQS. EPA believes that states can establish that they have the basic SIP structure, notwithstanding that there may be potential deficiencies within the existing SIP. Thus, EPA's proposals mentioned these issues not because the Agency considers them issues that must be addressed in the context of an infrastructure SIP as required by section 110(a)(1) and (2), but rather because EPA wanted to be clear that it considers these potential existing SIP problems as separate from the pending infrastructure SIP actions.

<sup>11</sup> Id., at page 4. In retrospect, the concerns raised by commenters with respect to EPA's approach to some substantive issues indicates that the statute is not so "self explanatory," and indeed is sufficiently ambiguous that EPA needs to interpret it in order to explain why these substantive issues do not need to be addressed in the context of infrastructure SIPs and may be addressed at other times and by other means.

EPA believes that this approach to the infrastructure SIP requirement is reasonable, because it would not be feasible to read section 110(a)(1) and (2) to require a top to bottom, stem to stern, review of each and every provision of an existing SIP merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts that, while not fully up to date, nevertheless may not pose a significant problem for the purposes of “implementation, maintenance, and enforcement” of a new or revised NAAQS when EPA considers the overall effectiveness of the SIP. To the contrary, EPA believes that a better approach is for EPA to determine which specific SIP elements from section 110(a)(2) are applicable to an infrastructure SIP for a given NAAQS, and to focus attention on those elements that are most likely to need a specific SIP revision in light of the new or revised NAAQS. Thus, for example, EPA’s 2007 Guidance specifically directed states to focus on the requirements of section 110(a)(2)(G) for the 1997 PM<sub>2.5</sub> NAAQS because of the absence of underlying EPA regulations for emergency episodes for this NAAQS and an anticipated absence of relevant provisions in existing SIPs.

Finally, EPA believes that its approach is a reasonable reading of section 110(a)(1) and (2) because the statute provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow the Agency to take appropriate tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a “SIP call” whenever the Agency determines that a state’s SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or otherwise to comply with the CAA.<sup>12</sup> Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.<sup>13</sup>

<sup>12</sup> EPA has recently issued a SIP call to rectify a specific SIP deficiency related to the SSM issue. See, “Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,” 74 FR 21639 (April 18, 2011).

<sup>13</sup> EPA has recently utilized this authority to correct errors in past actions on SIP submissions related to PSD programs. See, “Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule,”

Significantly, EPA’s determination that an action on the infrastructure SIP is not the appropriate time and place to address all potential existing SIP problems does not preclude the Agency’s subsequent reliance on provisions in section 110(a)(2) as part of the basis for action at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director’s discretion provisions in the course of acting on the infrastructure SIP, EPA believes that section 110(a)(2)(A) may be among the statutory bases that the Agency cites in the course of addressing the issue in a subsequent action.<sup>14</sup>

### III. What is our response to comments received on the notice of proposed rulemaking?

The public comment period for EPA’s proposal to approve some elements and conditionally approve other elements of certifications submitted by the Region 5 states closed on May 31, 2011. EPA received three comment letters; a synopsis of the significant individual comments as well as EPA’s response to each comment is discussed below.

*Comment 1:* One commenter objected to EPA’s proposed approvals of the states’ SIPs on the ground that the states are not adequately notifying the public of health risks related to the most recent ozone and PM<sub>2.5</sub> NAAQS. According to the commenter, the SIPs are not consistent with section 110(a)(2)(J), Sub-element 2: Public Notification, and EPA’s approval of the submissions violates section 110(l). The commenter argued that it “is wrong for States inform the public that the air is ‘safe’ based on the 1997 ozone and PM<sub>2.5</sub> NAAQS, particularly when EPA has determined that concentrations of ground-level ozone above 75 parts per billion (ppb) and concentrations of PM<sub>2.5</sub> above 35 micrograms per cubic meter (µg/m<sup>3</sup>) are unsafe.” The commenter continued that “there is no reason why States should not be

75 FR 82,536 (December 30, 2010). EPA has previously used its authority under CAA 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See, e.g., 61 FR 38664 (July 25, 1996) and 62 FR 34641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67062 (November 16, 2004) (corrections to California SIP); and 74 FR 57051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

<sup>14</sup> EPA has recently disapproved a SIP submission from Colorado on the grounds that it would have included a director’s discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, e.g., 75 FR 42342 at 42344 (July 21, 2010) (proposed disapproval of director’s discretion provisions); 76 FR 4540 (Jan. 26, 2011) (final disapproval of such provisions).

informing the public of air pollution dangers based on the 75 ppb ozone NAAQS and the 35 µg/m<sup>3</sup> PM<sub>2.5</sub> NAAQS.” The commenter urged EPA to require states to inform the public of “unsafe air pollution levels based on EPA’s official understanding of current public health science.”

*Response 1:* EPA disagrees with the commenter’s view that the existing SIPs of these states are not sufficient for purposes of the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS, and that approval thereof is inconsistent with section 110(l). In the proposed rulemaking, EPA concluded that each of the Region 5 states “\* \* \* has met the requirements of this portion of section 110(a)(2)(J) with respect to the 1997 ozone and PM<sub>2.5</sub> NAAQS.” As explained above, in these actions EPA is only addressing the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS, and is not taking action with respect to any other NAAQS.

EPA agrees with the commenter that these NAAQS are not as protective as needed for public health and welfare, as shown by EPA’s more recent promulgation of new NAAQS for both ground level ozone and particulate matter based on new or revised health assessments.<sup>15</sup> Nevertheless, all of the Region 5 states’ submittals at issue in this action were intended to satisfy the infrastructure SIP requirements in relation to the 1997 8-hour ozone NAAQS and 1997 PM<sub>2.5</sub> NAAQS. EPA’s action here only addresses the requirements of section 110(a)(1) and (2) in the context of these NAAQS, and not of any subsequent NAAQS. EPA will be taking separate actions on the Region 5 states’ submittals for section 110(a)(1) and (2) with respect to the revised ozone and PM<sub>2.5</sub> NAAQS. In those later actions, EPA will evaluate the states’ satisfaction of applicable elements of section 110(a)(2), including section 110(a)(2)(J), based on the applicable NAAQS.

As a further point of information, EPA observes that all Region 5 states participate in the AIRNOW program, which reports air quality according to the current promulgated indices. Thus, members of the public do have access to information concerning the ambient air quality in their states, and this information is given with respect to the most recent ozone and PM<sub>2.5</sub> NAAQS. EPA believes that the availability of this information serves to address the

<sup>15</sup> The most recent revisions to the 8-hour ground level ozone NAAQS was published in the **Federal Register** on March 27, 2008 (73 FR 16436), and the most recent revisions to the 24-hour PM<sub>2.5</sub> NAAQS was published in the **Federal Register** on October 17, 2006 (71 FR 61144).

commenter's concerns with respect to public information.

Finally, EPA disagrees with the commenter's view of the applicability of section 110(l) to these actions on infrastructure SIPs. EPA agrees that after the Agency promulgates a new or revised NAAQS, subsequent SIP revisions should generally be evaluated for compliance with section 110(l) in light of the existence of any such new or revised NAAQS. However, section 110(l) is more typically a concern with respect to revisions to an existing SIP in which there could be a relaxation of a SIP approved provision in a way that would interfere with attainment or maintenance of the NAAQS or any other applicable requirement of the CAA. In this action, however, EPA is merely approving a new submission that does not purport to subtract from the existing SIP as previously approved by the Agency. These submissions are intended to assure that the state's SIP meets the requirements with respect to the specific NAAQS at issue, i.e., the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS.

*Comment 2:* One commenter objected to EPA's proposed approval of the submissions from several states on the grounds that the SIPs of each state contain impermissible provisions. The commenter asserted that the states of Wisconsin, Indiana, and Illinois have SSM exemptions in regulations within their existing SIPs that are in conflict with EPA's interpretation of the CAA. The commenters argued that such provisions are contrary to section 110, and that until such provisions are removed, the SIPs do not meet the requirements of section 110.

*Response 2:* EPA disagrees with the commenter's apparent conclusion that if a state's existing SIP contains any arguably illegal SSM provision, then EPA cannot approve the infrastructure SIP submission of that state. As discussed in more detail in section II of this final rulemaking, "What is the scope of this final rulemaking?," EPA does not agree that action upon an infrastructure SIP required by section 110(a)(1) and (2) requires that EPA address any existing SSM provisions.

EPA shares the commenter's concerns that certain existing SSM provisions may be contrary to the CAA and existing Agency guidance, and that such provisions can have an adverse impact on air quality control efforts in a given state. As stated in the proposal, EPA plans to address such provisions in the future, and in the meantime encourages any state having a deficient SSM provision to take steps to correct it as soon as possible.

*Comment 3:* The same commenter also objected to EPA's proposed approvals on the grounds that the existing SIPs of two states contain another form of impermissible provision within their regulations. The commenter asserted that the states of Wisconsin and Illinois have director's discretion provisions in their respective regulations that allow the director of their respective environmental protection agencies to allow violations of SIP approved emissions limits by sources under certain circumstances.

*Response 3:* EPA also disagrees with the commenter's apparent conclusion that if a state's existing SIP contains any arguably illegal director's discretion or director's variance provision, then EPA cannot approve the infrastructure SIP submission of that state. As discussed in more detail in section II of this final rulemaking, "What is the scope of this final rulemaking?," EPA does not agree that action upon an infrastructure SIP required by section 110(a)(1) and (2) requires that EPA address any existing director's discretion provisions.

EPA shares the commenter's concerns that certain existing director's discretion provisions may be contrary to the CAA and existing Agency guidance, and that such provisions can have an adverse impact on air quality control efforts in a given state. As stated in the proposal, EPA plans to take action in the future to address such provisions, and in the meantime encourages any state having a deficient director's discretion or director's variance provision to take steps to correct it as soon as possible.

*Comment 4:* One commenter objected to EPA's proposed approval because it did not explain why the Agency was not acting on the requirements of section 110(a)(2)(D)(i) in the context of the infrastructure SIPs for the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS. The commenter argued that EPA provided no basis for, and professed its own lack of awareness of a basis for, the exclusion of section 110(a)(2)(D)(i) from this action. The commenter implied that because EPA was not addressing section 110(a)(2)(D)(i) in this specific action, it renders the action on the other elements of section 110(a)(2) illegitimate.

*Response 4:* As previously explained, EPA bifurcated action on section 110(a)(2)(D)(i) from the other applicable infrastructure SIP requirements of section 110(a)(2) for the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS. This approach dates back to 2005 when EPA entered into a consent decree with Environmental Defense Fund which required EPA to make completeness findings with respect to

section 110(a)(2)(D)(i) by March 15, 2005, and which required EPA to make completeness findings with respect to other applicable requirements of section 110(a)(2) by December 15, 2007, for the 1997 ozone NAAQS, and by October 5, 2008, for the 1997 PM<sub>2.5</sub> NAAQS. The findings notice that announced EPA's completeness determinations for the infrastructure SIP submissions for the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS clearly articulated which elements of section 110(a)(2) were relevant to those specific submissions.<sup>16</sup> In addition, EPA issued two separate guidance documents making recommendations for SIP submissions to meet section 110(a)(2)(D)(i) and for the other applicable requirements of section 110(a)(2) for these NAAQS. As a result, states made one or more separate submissions to address the substantive requirements of section 110(a)(2)(D)(i) that are separate from, and outside the scope of, the SIP submissions that are at issue in this action.

*Comment 5:* One commenter argued that the air pollution enforcement program in Indiana is not sufficient, and implies that this is a basis for EPA not to approve the infrastructure SIP submission from the state. According to the commenter, press reports indicate that the State is not aggressively enforcing air pollution regulations. In support of its concerns, the commenter referred to an unspecified letter from EPA to IDEM in which EPA expressed concerns about changes to the enforcement program and funding of the enforcement program in Indiana. In addition, the commenter asserted that IDEM has an enforcement policy that requires a higher threshold for enforcement showing adverse health impacts as a result of a violation and that this threshold is inconsistent with protection of public health because of the difficulty of proving causation with respect to health impacts.

*Response 5:* EPA acknowledges that concerns have been raised about enforcement of air pollution programs in Indiana, including concerns raised by EPA in a June 24, 2009 letter to David Phippen, Policy Director in the Office of the Indiana Governor. However, EPA disagrees that these concerns rise to the level of demonstrating that the state's SIP is insufficient to meet the basic requirements of section 110(a)(2)(A) and (E) with respect to enforcement.

<sup>16</sup> See, e.g., "Completeness Findings for Section 110(a) State Implementation Plans for the 8-hour Ozone NAAQS, 73 FR 16205 (March 27, 2008). EPA specifically noted that section 110(a)(2)(D)(i) was being addressed in separate SIP actions. Id., 73 FR at 16206, at footnote 1.

The commenter's primary objections with respect to enforcement in Indiana go to matters that are properly construed as questions of "enforcement discretion." In other words, EPA believes that certain decisions about how best to direct enforcement resources, what sources to investigate, what types of violations warrant more attention, etc., are largely matters of discretion that a state may determine.<sup>17</sup> EPA agrees that such enforcement discretion, if taken to extremes, could call into question whether a state was effectively meeting its obligations under the CAA. EPA does not see evidence of that in this case. Similarly, questions of the adequacy of resources for effective enforcement are largely matters of state discretion and would not be a basis for disapproval action by EPA unless there were clear evidence that the absence of resources rose to the level that the state was not capable of fulfilling its obligations under the CAA. EPA does not see evidence of that in this case. In short, EPA does not see a basis for disapproval of the infrastructure SIP submissions by Indiana based on the questions raised by the commenter.

EPA continues to monitor IDEM's air enforcement program through monthly conference calls and reviews of enforcement data submitted by IDEM. EPA confirms that IDEM inspectors are meeting EPA's Compliance Monitoring Strategy requirements and furthermore, enforcement under IDEM's reorganized Compliance and Enforcement Branch has shown an increase in the number of enforcement actions timeliness of resolution.

EPA concludes that, in the context of acting on the infrastructure SIPs for the 1997 8-hour ozone and 1997 PM<sub>2.5</sub> NAAQS, the air pollution enforcement program in Indiana is consistent with the basic requirements of section 110(a)(1) and (2) of the CAA. In the event that concerns with respect to adequate enforcement of the air pollution program in the state arise in the future, EPA could address such concerns using appropriate authorities under the CAA.

*Comment 6:* One commenter argued that Illinois has state law provisions that undermine enforcement of SIP requirements. The commenter asserts that the enforcement of air pollution regulations in Illinois "is undermined by a convoluted interpretation of State

law, including a lengthy appeals process and 'automatic stay' provisions that are applicable to Illinois Pollution Control Board hearings." According to the commenter, permittees who challenge their permits benefit by stays of the challenged permit provisions that can provide de facto variances from SIP requirements. Implicitly, the commenter argued that this issue would preclude EPA's approval of the infrastructure SIP submission by Illinois for the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS.

*Response 6:* EPA disagrees that the issue raised by the commenter requires EPA to disapprove the submission by Illinois. EPA's review of the infrastructure SIP is intended to evaluate whether the state's SIP contains the basic requirements for implementation, maintenance, and enforcement of the NAAQS in question. The commenter's concerns go to a very specific issue resulting from interpretations of state law. EPA believes that this issue has already been resolved with the state.

On March 3, 2011, EPA completed a review of Illinois EPA's enforcement program in the context of the CAA. EPA is committed to working with the State to address any problems that were documented in the review. With respect to the automatic stay provisions in Illinois, the Illinois State legislature amended the Illinois Environmental Protection Act (415 ILCS 5/) to address this deficiency. The Governor of Illinois signed this legislation on June 20, 2010. This legislation eliminated the 'automatic stay' provisions noted by the commenter; therefore, EPA believes that all concerns with respect to this issue have been resolved with respect to approval of Illinois' infrastructure SIP for the 1997 8-hour ozone and 1997 PM<sub>2.5</sub> NAAQS.

*Comment 7:* One commenter asserted that Wisconsin is not implementing its SIP sufficiently to comply with 40 CFR 51.160 and section 110(a) of the CAA. The commenter took issue with three aspects of Wisconsin's permitting program, particularly with respect to modeling. First, the commenter alleged that WDNR is effectively exempting sources from demonstrating, through modeling, that emissions from those sources will not cause NAAQS violations or prevent NAAQS maintenance. In support of this claim, the commenter claimed that " \* \* \* DNR's 'guidance' <sup>18</sup> on modeling notes that sources can avoid modeling in

nonattainment areas if they obtain offsets or model below the SIL—despite no SIP provision for Wisconsin allowing such exemptions to Wis. Stat. § 285.63(1). Wisconsin DNR's 'guidance' also exempts all operating permits for sources in nonattainment areas from the clea[r] requirement to demonstrate compliance with (and non-prevention of maintenance of) NAAQS as a condition of permit approval for all operating permits for all sources (not merely those in attainment areas) in Wis. Stat. § 285.63(1)."

Second, the commenter asserted that WDNR has not been modeling compliance with PM<sub>2.5</sub> for registration permits, and has supported the claim by citing Wis. Stat. § 285.63. As evidence for this claim, the commenter pointed to a recent decision by a state Administrative Law Judge concerning a failure to model compliance with the PM<sub>2.5</sub> NAAQS. The commenter claimed that the State continues to fail to do so.

Third, the commenter claimed that WDNR does not model ozone impacts, i.e., ozone NAAQS compliance, in contravention of the SIP requirement to demonstrate compliance with all NAAQS as a condition of permit issuance. Moreover, the commenter further asserted that to its knowledge "DNR has never analyzed the impacts of facilities on ozone during permitting—as it is required to do pursuant to 42 U.S.C. 7410(a), 40 CFR 51.160, 51.166 and Wis. Stat. § 285.63(1). In fact, DNR's guidance states explicitly that it does not model for ozone impacts."

*Response 7:* EPA disagrees with the commenter's conclusions on each point. First, with respect to the claim that the state's guidance improperly "exempts" sources from modeling, EPA disagrees with the commenter's conclusions. EPA's regulations at 40 CFR part 51 section 160(a) and (b) require that states have a procedure to establish whether a source will, inter alia, interfere with attainment or maintenance of the NAAQS. The guidance cited by the commenter is not inconsistent with this requirement, and EPA's regulations do not preclude the appropriate use of offsets or SILs as a means to determine that there will not be such an impact. Therefore, the commenter's objections do not indicate that the State's infrastructure SIP is inconsistent with the applicable requirements of section 110(a)(1) and (2).

Second, the argument that the commenter made with respect to the decision of the Administrative Law Judge is a matter of concern, but does not establish that the State is failing to conduct the necessary analysis in connection with all permits. Moreover,

<sup>17</sup> It is important to note that the state's exercise of enforcement discretion in the case of a particular violation does not affect potential enforcement by EPA or other parties. Thus, the state's policies with respect to what types of violations warrant enforcement action by the state do not necessarily affect the enforceability of the SIP itself.

<sup>18</sup> The guidance that is being referred to can be found here: [http://dnr.wi.gov/air/pdf/wdnrguidance\\_v71final.pdf](http://dnr.wi.gov/air/pdf/wdnrguidance_v71final.pdf)



the decision in question relates to the minor source NSR program, and as explained in section II, minor source NSR is an issue that EPA considers outside of the scope of infrastructure SIP evaluations. Therefore, any evaluation of Wisconsin's minor source NSR program will be conducted independently of this rulemaking.

Finally, in response to the commenter's third point, the PSD regulations require an ambient impact analysis for ozone for proposed major stationary sources and major modifications to obtain a PSD permit (40 CFR 51.166 (b)(23)(i), (i)(5)(i)(f), (k), (l) and (m) and 40 CFR 52.21 (b)(23)(i), (i)(5)(i)(f), (k), (l) and (m)), but not necessarily modeling in all cases. The regulations at 40 CFR 51.166(l) state that for air quality models the SIP shall provide for procedures which specify that:

(1) All applications of air quality modeling involved in this subpart shall be based on the applicable models, data bases, and other requirements specified in Appendix W of this part (Guideline on Air Quality Models).

(2) Where an air quality model specified in Appendix W of this part (Guideline on Air Quality Models) is inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific State program. Written approval of the Administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures set forth in § 51.102.

These parts of 40 CFR Part 51 and 52 are the umbrella SIP components that states have either adopted by reference or the states have been approved and delegated authority to incorporate the PSD requirements of the CAA. As discussed above, these Part 51 and 52 PSD provisions refer to 40 CFR Part 51, Appendix W for the appropriate method to utilize for the ambient impact assessment. 40 CFR Part 51, Appendix W is the Guideline on Air Quality models and Section 1.0.a. states:

The guideline recommends air quality modeling techniques that should be applied to State Implementation Plan (SIP) revisions for existing sources and to new source review (NSR), including prevention of significant deterioration (PSD). {footnotes not included} Applicable only to criteria air pollutants, it is intended for use by EPA Regional Offices in judging the adequacy of modeling analyses

performed by EPA, State and local agencies, and by industry. \* \* \* The *Guideline* is not intended to be a compendium of modeling techniques. Rather, it should serve as a common measure of acceptable technical analysis when supported by sound scientific judgment.

Appendix W Section 5.2.1. includes the *Guideline* recommendations for models to be utilized in assessing ambient air quality impacts for ozone. Specifically, Section 5.2.1.c states:

Estimating the Impact of Individual Sources. Choice of methods used to assess the impact of an individual source depends on the nature of the source and its emissions. Thus, model users should consult with the Regional Office to determine the most suitable approach on a case-by-case basis (subsection 3.2.2).

Appendix W Section 5.2.1.c provides that the state and local permitting authorities and permitting applicants should work with the appropriate EPA Regional Office on a case-by-case basis to determine an adequate method for performing an air quality analysis for assessing ozone impacts. Due to the complexity of modeling ozone and the dependency on the regional characteristics of atmospheric conditions, EPA believes this is an appropriate approach rather than specifying a method for assessing single source ozone impacts, which may not be appropriate in all circumstances. Instead, the choice of method "depends on the nature of the source and its emissions. Thus, model users should consult with the Regional Office \* \* \*." Appendix W Section 5.2.1.c. Therefore, EPA continues to believe it is appropriate for permitting authorities to consult and work with EPA Regional Offices as described in Appendix W, including section 3.0.b and c, 3.2.2, and 3.3, to determine the appropriate approach to assess ozone impacts for each PSD required evaluation.

EPA has previously approved the State's PSD program.<sup>19</sup> EPA observes that Wisconsin routinely consults with staff in the Region 5 Office to examine the impacts of ozone from specific sources on a case-by-case basis for permitting purposes. Moreover, EPA observes that the modeling guidance referenced by the commenter is not an approved part of Wisconsin's SIP. Thus, the commenter has not demonstrated that we should not approve this infrastructure SIP submission.

<sup>19</sup> See, "Approval and Promulgation of Implementation Plans; Wisconsin," 64 FR 28745 (May 27, 1999).

*Comment 8:* One commenter objected to EPA's proposed conditional approval of the submissions of Indiana, Michigan, and Ohio, with respect to section 110(a)(2)(C) based upon a commitment of each state to update its respective SIP to eliminate the use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> in its PSD program. The commenter argued that this use of a conditional approval is inappropriate because it would allow states to continue to use a PM<sub>10</sub> surrogacy policy that EPA has explicitly determined may not be used by states after May 16, 2011. The commenter further asserted that aside from the inappropriate use of conditional approval, any approval of SIPs that rely on the use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> would be contrary to the CAA for a variety of legal and factual reasons.

*Response 8:* Based on an evaluation of the concerns raised by the commenter, EPA has concluded that a conditional approval is not appropriate in these specific facts and circumstances. Congress has explicitly authorized EPA to use conditional approvals under section 110(k)(4), provided that states make a commitment to adopt specific measures by a date certain within one year. As noted by the commenter, the courts have confirmed that conditional approvals are an available course of action under section 110(k), but only if the statutory conditions for such a conditional approval have been met.

In this instance, EPA believed that the states had made commitments to take sufficiently "specific" actions within the statutorily allotted time, by committing to make a specified SIP submission that would eliminate the use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> by a date certain.<sup>20</sup> However, the commenter's concerns go not to whether the commitments were specific enough, but rather to whether a conditional approval is appropriate at all, in light of other EPA determinations with respect to when states must cease using the PM<sub>10</sub> surrogate policy. EPA agrees that its own determination with respect to when states must cease using the PM<sub>10</sub>

<sup>20</sup> The commenter cited *Sierra Club v. EPA*, 356 F.3d 296 (D.C. Cir. 2004), for the proposition that EPA cannot use a section 110(k)(4) conditional approval to approve plans that do "nothing more than promise to do tomorrow what the Act requires today." EPA disagrees with this overbroad contention. So long as the conditional approval meets the statutory requirements of section 110(k)(4), EPA believes that it may be appropriate to give a conditional approval to a state allowing it to rectify a deficiency in a submission that would otherwise constitute a basis for a disapproval, if the state were not willing to commit to rectify the deficiency within the requisite time. To read the statute to prohibit use of section 110(k)(4) in such circumstances, as the commenters advocate, would render it a legal nullity.



surrogacy policy is relevant to whether a conditional approval is the correct course of action. Section 110(k)(4) provides that EPA “may” approve a SIP conditionally, thereby indicating that EPA has discretion to determine that a given substantive issue is or is not suitable for a conditional approval. After considering the commenter’s concerns, EPA has concluded that a conditional approval is not appropriate in these circumstances.

In order to address the commenter’s substantive concern about continued use of the PM<sub>10</sub> surrogate policy after May 16, 2011, EPA asked the states of Indiana, Michigan, and Ohio to clarify the facts with respect to their current usage of the PM<sub>10</sub> surrogate policy for PSD permitting purposes. All three states responded that they have the legal authority under their respective PSD regulations to regulate PM<sub>2.5</sub> directly, rather than PM<sub>10</sub>. Furthermore, the states of Indiana, Michigan, and Ohio confirmed that they have discontinued reliance on the PM<sub>10</sub> surrogate policy to satisfy the PSD requirements for PM<sub>2.5</sub>. Indiana, Michigan, and Ohio transmitted letters affirming these points on June 17, 2011, June 22, 2011, and June 23, 2011, respectively.

EPA considers the letters from each state to be a supplemental submission that clarifies and updates the prior infrastructure SIP submissions. Therefore, EPA considers the facts as represented by each state in its letter to be a part of the basis for its evaluation of the infrastructure SIPs. Because each state has confirmed that it already has

the requisite legal authority to regulate PM<sub>2.5</sub> directly in its PSD program, and because each state has confirmed that it is no longer using the PM<sub>10</sub> surrogate policy, EPA concludes that there is no need to use a conditional approval with respect to section 110(a)(2)(C) for each of these states. Therefore, in today’s action EPA is simply approving the submissions with respect to section 110(a)(2)(C). EPA believes that this course of action will alleviate the legitimate concerns of the commenters with respect to any continued use of the PM<sub>10</sub> surrogacy policy in these states.

**IV. What action is EPA taking?**

For the reasons discussed in the proposed rulemaking, as well as the responses to comments received by EPA during the public comment period, EPA is taking final action to approve elements of submissions from the EPA Region 5 states certifying that the current SIPs are sufficient to meet the applicable infrastructure elements under sections 110(a)(1) and (2) for the 1997 8-hour ozone NAAQS and the 1997 PM<sub>2.5</sub> NAAQS. Notably, whereas the proposed rulemaking contained conditional approvals for Indiana, Michigan, and Ohio with respect to their satisfaction of section 110(a)(2)(C), Sub-element 3: PM<sub>10</sub> surrogate policy, EPA’s final action for these three states is an approval based on the discussion in the response to Comment 8.

Based upon comments received during the rulemaking, EPA is not finalizing its proposed approval of the submission from the State of Wisconsin with respect to two narrow issues that

relate to section 110(a)(2)(C): (i) The requirement for consideration of NO<sub>x</sub> as a precursor to ozone; and (ii) the definition of “major modification” related to fuel changes for certain sources. EPA will address these issues in a later action.

As detailed in section II of this final action, EPA is affirming that there are four substantive issues outside of the scope of this rulemaking: SSM provisions, director’s discretion provisions, NSR Reform, and minor source NSR. It should be noted, however, that our proposed rulemaking included discussion of various past EPA approvals of minor source NSR program submissions from Region 5 states in connection with section 110(a)(2)(C). After realizing the confusion engendered by EPA’s statements about certain issues that the Agency considers outside the scope of action on infrastructure SIPs, we want to clarify that EPA does not consider the minor source NSR program to be one that states must address in their infrastructure SIPs, nor one that EPA must evaluate in approving such infrastructure SIPs. Therefore, our final action maintains that EPA is neither approving nor disapproving the minor source NSR programs in the states of Illinois, Indiana, Ohio, Michigan, Minnesota, and Wisconsin in the context of infrastructure SIPs. Any future evaluation of those minor source NSR programs will be conducted independently of today’s actions.

Specifically, these are EPA’s final actions, by element of section 110(a)(2):

Element	IL	IN	OH	MI	MN	WI <sup>21</sup>
A: Emission limits and other control measures .....	A	A	A	A	A	A
B: Ambient air quality monitoring and data system .....	A	A	A	A	A	A
C1: Enforcement of SIP measures .....	A	A	A	A	A	A
C2: NO <sub>x</sub> as a precursor to ozone in PSD regulations .....	*	A	A	A	*	NA
C3: PM <sub>10</sub> surrogate policy in PSD regulations .....	*	A	A	A	*	A
C4: NSR reform .....	NA	NA	NA	NA	NA	NA
C5: GHG permitting in PSD regulations .....	*	A	A	A	*	A
C6: Minor source NSR regulations .....	NA	NA	NA	NA	NA	NA
D(i): Interstate transport .....	NA	NA	NA	NA	NA	NA
D(ii): Interstate and international pollution abatement .....	A	A	A	A	A	A
E: Adequate resources .....	A	A	A	A	A	A
F: Stationary source monitoring system .....	A	A	A	A	A	A
G: Emergency power .....	A	A	A	A	A	A
H: Future SIP revisions .....	A	A	A	A	A	A
I: Nonattainment area plan or plan revisions under part D .....	NA	NA	NA	NA	NA	NA
J1: Consultation with government officials .....	A	A	A	A	A	A
J2: Public notification .....	A	A	A	A	A	A
J3: PSD .....	**	**	**	**	**	**
J4: Visibility protection (Regional Haze) .....	NA	NA	NA	NA	NA	NA
K: Air quality modeling and data .....	A	A	A	A	A	A
L: Permitting fees .....	A	A	A	A	A	A

<sup>21</sup> In addition to the information provided in this table for the State of Wisconsin, EPA reiterates once again that we are not finalizing any action with

respect to the definition of “major modification” related to fuel changes for certain sources in Wisconsin. EPA will address this issue, as well as

Wisconsin’s PSD provisions that include NO<sub>x</sub> as a precursor to ozone, in a separate action.

Element	IL	IN	OH	MI	MN	WI <sup>21</sup>
M: Consultation and participation by affected local entities .....	A	A	A	A	A	A

In the above table, the key is as follows:  
 A Approve.  
 NA No Action/Separate Rulemaking.  
 \* Federally promulgated rules in place.  
 \*\* Previously discussed in element (C).

**V. Statutory and Executive Order Reviews**

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Clean Air Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human

health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 12, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: June 30, 2011.

**Susan Hedman,**  
*Regional Administrator, Region 5.*

40 CFR part 52, is amended as follows:

**PART 52—[AMENDED]**

■ 1. The authority citation for part 52 continues to read as follows:

*Authority:* 42 U.S.C. 7401 *et seq.*

**Subpart O—Illinois**

■ 2. Section 52.745 is added to read as follows:

**§ 52.745 Section 110(a)(2) Infrastructure Requirements.**

(a) *Approval.* In a December 12, 2007 submittal, Illinois certified that the State has satisfied the infrastructure SIP requirements of section 110(a)(2)(A) through (C), (D)(ii), (E) through (H), and (J) through (M) for the 1997 8-hour ozone NAAQS. Illinois continues to implement the Federally promulgated rules for the prevention of significant deterioration as they pertain to section 110(a)(2)(C) and (J).

(b) *Approval.* In a December 12, 2007 submittal, Illinois certified that the State has satisfied the infrastructure SIP requirements of section 110(a)(2)(A) through (C), (D)(ii), (E) through (H), and (J) through (M) for the 1997 PM<sub>2.5</sub> NAAQS. Illinois continues to implement the Federally promulgated rules for the prevention of significant deterioration as they pertain to section 110(a)(2)(C) and (J).

**Subpart P—Indiana**

■ 3. In § 52.770, the table in paragraph (e) is amended by adding entries in alphabetical order for "Section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS" and "Section 110(a)(2) Infrastructure Requirements for the 1997 PM<sub>2.5</sub> NAAQS" to read as follows:

**§ 52.770 Identification of plan.**

\* \* \* \* \*  
 (e) \* \* \*

EPA-APPROVED INDIANA NONREGULATORY AND QUASI-REGULATORY PROVISIONS

Title	Indiana date	EPA approval	Explanation
* Section 110(a)(2) infrastructure requirements for the 1997 8-Hour Ozone NAAQS.	* 12/7/2007, 9/19/2008, 3/23/2011, and 4/7/2011.	* 7/13/2011, [Insert page number where the document begins].	* This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).
* Section 110(a)(2) infrastructure requirements for the 1997 PM <sub>2.5</sub> NAAQS.	* 12/7/2007, 9/19/2008, 3/23/2011, and 4/7/2011.	* 7/13/2011, [Insert page number where the document begins].	* This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).

**Subpart X—Michigan**

■ 4. In § 52.1170, the table in paragraph (e) is amended by adding entries at the end of the table for “Section 110(a)(2)

Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS” and “Section 110(a)(2) Infrastructure Requirements for the 1997 PM<sub>2.5</sub> NAAQS” to read as follows:

**§ 52.1170 Identification of plan.**  
\* \* \* \* \*  
(e) \* \* \*

EPA-APPROVED MICHIGAN NONREGULATORY AND QUASI-REGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Comments
* Section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS.	* Statewide .....	* 12/6/07, 7/19/08, and 4/6/11.	* 7/13/11, [Insert page number where the document begins].	* This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).
* Section 110(a)(2) Infrastructure Requirements for the 1997 PM <sub>2.5</sub> NAAQS.	* Statewide .....	* 12/6/07, 7/19/08, and 4/6/11.	* 7/13/11, [Insert page number where the document begins].	* This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).

**Subpart Y—Minnesota**

■ 5. In § 52.1220, the table in paragraph (e) is amended by adding entries in alphabetical order for “Section 110(a)(2)

Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS” and “Section 110(a)(2) Infrastructure Requirements for the 1997 PM<sub>2.5</sub> NAAQS” to read as follows:

**§ 52.1220 Identification of plan.**  
\* \* \* \* \*  
(e) \* \* \*

EPA-APPROVED MINNESOTA NONREGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approved date	Comments
* Section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS.	* Statewide .....	* 11/29/07	* 7/13/11, [Insert page number where the document begins].	* This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). Minnesota continues to implement the Federally promulgated rules for the prevention of significant deterioration as they pertain to section 110(a)(2)(C) and (J).
* Section 110(a)(2) Infrastructure Requirements for the 1997 PM <sub>2.5</sub> NAAQS.	* Statewide .....	* 11/29/07	* 7/13/11, [Insert page number where the document begins].	* This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). Minnesota continues to implement the Federally promulgated rules for the prevention of significant deterioration as they pertain to section 110(a)(2)(C) and (J).

EPA-APPROVED MINNESOTA NONREGULATORY PROVISIONS—Continued

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approved date	Comments
*	*	*	*	*

**Subpart KK—Ohio**

■ 6. Section 52.1891 is added to read as follows:

**§ 52.1891 Section 110(a)(2) Infrastructure Requirements.**

(a) *Approval.* In a December 5, 2007 submittal, supplemented on April 7, 2011, Ohio certified that the State has satisfied the infrastructure SIP requirements of section 110(a)(2)(A) through (C), (D)(ii), (E) through (H), and (J) through (M) for the 1997 8-hour ozone NAAQS.

(b) *Approval.* In a December 5, 2007 submittal, supplemented on April 7, 2011, Ohio certified that the State has satisfied the infrastructure SIP requirements of section 110(a)(2)(A) through (C), (D)(ii), (E) through (H), and (J) through (M) for the 1997 PM<sub>2.5</sub> NAAQS.

**Subpart YY—Wisconsin**

■ 7. Section 52.2591 is added to read as follows:

**§ 52.2591 Section 110(a)(2) Infrastructure Requirements.**

(a) *Approval.* In a December 12, 2007 submittal, supplemented on January 24, 2011 and March 28, 2011, Wisconsin certified that the State has satisfied the infrastructure SIP requirements of section 110(a)(2)(A) through (C), (D)(ii), (E) through (H), and (J) through (M) for the 1997 8-hour ozone NAAQS. EPA is not finalizing its proposed approval of the submission from the State of Wisconsin with respect to two narrow issues that relate to section 110(a)(2)(C): The requirement for consideration of NO<sub>x</sub> as a precursor to ozone; and (ii) the definition of “major modification” related to fuel changes for certain sources. EPA will address these issues in a later action.

(b) *Approval.* In a December 12, 2007 submittal, supplemented on January 24, 2011 and March 28, 2011, Wisconsin certified that the State has satisfied the infrastructure SIP requirements of section 110(a)(2)(A) through (C), (D)(ii), (E) through (H), and (J) through (M) for the 1997 PM<sub>2.5</sub> NAAQS. EPA is not finalizing its proposed approval of the submission from the State of Wisconsin with respect to two narrow issues that relate to section 110(a)(2)(C): The

requirement for consideration of NO<sub>x</sub> as a precursor to ozone; and the definition of “major modification” related to fuel changes for certain sources. EPA will address these issues in a later action.

[FR Doc. 2011-17463 Filed 7-12-11; 8:45 am]

**BILLING CODE 6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R05-OAR-2010-0036; FRL-9430-9]**

**Approval and Promulgation of Air Quality Implementation Plans; Ohio; Volatile Organic Compound Reinforced Plastic Composites Production Operations Rule**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is approving into the Ohio State Implementation Plan (SIP) a new rule for the control of volatile organic compound (VOC) emissions from reinforced plastic composites production operations. This rule applies to any facility that has reinforced plastic composites production operations. This rule is approvable because it satisfies the requirements of the Clean Air Act (CAA). EPA proposed this rule for approval on January 27, 2011, and received three sets of comments.

**DATES:** This final rule is effective on August 12, 2011.

**ADDRESSES:** EPA has established a docket for this action under Docket ID EPA-R05-OAR-2010-0036. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard,

Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Steven Rosenthal, Environmental Engineer, at (312) 886-6052 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:**

Steven Rosenthal, Environmental Engineer, Air Planning and Maintenance Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-6052.

**SUPPLEMENTARY INFORMATION:**

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA. This supplementary information section is arranged as follows:

- I. What public comments were received on the proposed approval and what is EPA’s response?
- II. What action is EPA taking today and what is the basis of this action?
- III. Statutory and Executive Order Reviews

**I. What public comments were received on the proposed approval and what is EPA’s response?**

EPA received three comments. A discussion of each follows:

(A) An anonymous comment was in support of EPA’s approval of Ohio’s rule.

(B) The Aquatic Company commented that it is concerned that the maximum achievable control technology (MACT) limits in subpart WWWW of 40 CFR part 63, for Reinforced Plastic Composites Production, underestimate emissions generated by tub/shower manufacturers and notes that EPA is currently working to correct these and other issues with subpart WWWW. The Aquatic Company opposes any rule which is tied to the subpart WWWW regulations. This comment is not directly relevant to this rulemaking because it is mainly a complaint against the MACT and provides no suggested revisions to Ohio’s rule.

(C) Premix, Inc. commented that it objects to the 25 tons VOC per year applicability cutoff for sheet mold compound (SMC) machines. Premix has successfully, and cost-effectively, controlled VOCs from its SMC machines using its Tight Wet Area Enclosures and a small Regenerative Thermal Oxidizer.